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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1862 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE R.BALIA. and
MR.JUSTICE A.R.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

MOHIT SHANTILAL SHAH

Versus

COMMISSIONER OF INCOME TAX GUJARAT - III

Appearance:

MR SN DIVATIA for Petitioner

MR MANISH R BHATT for Respondent No. 1

CORAM : MR.JUSTICE R.BALIA. and
MR.JUSTICE A.R.DAVE

Date of decision: 05/05/99

ORAL JUDGEMENT

[Per R. Balia, J.]

1. This petition is challenging the order of designated authority rejecting the application of the petitioner under Kar Vivad Samadhan Scheme as introduced by the Finance Act No.2 of 1998. The order is dated 23rd

February 1999.

2. First noticing the facts, the petitioner filed a return of his income for Assessment Year 1996-97 on 31st August 1996. He claimed certain amount received by him as arrears of professional fees after he ceased to be a practising advocate as not liable to tax relying on decision of Calcutta High Court in Commissioner of Income Tax v/s Justice R.M.Datta 180 ITR 86, and Bench of Income Tax Appellate Tribunal, at Delhi in the case of Kuldip Singh v/s Income Tax Officer. The petitioner paid the tax on the basis of return submitted by him in terms of section 140-A of the Income Tax Act. Income Tax Officer acting u/s 143 [1] [a] computed on the basis of such return the amount of tax or interest, if any, payable by the assessee and he found that some interest was payable by the assessee on the basis of such return u/s 234-B and 234-C computed thus the amount of tax payable and after adjusting the amount paid by the assessee. The amount so payable was intimated to the assessee as required under clause [i] of section 143[1] [a]. No other adjustment was made in terms of proviso to section 143[1][a]. The intimation of the tax due was made on 10/1/97. That amount was also paid and no objection thereto was raised by the petitioner at any time. However, as to assessee's claim to the exemption from tax in respect of arrears of professional fees received after he ceased to carry on the profession, notice u/s 143[2] was issued fixing the date of hearing on 19th June 1997. The regular assessment u/s 143 [3] ultimately came to be made on 18th January 1999 holding that the arrears of professional fees were taxable receipts and accordingly, demand was raised. The assessee filed an appeal against the said assessment of 25th January 1999. During this period, with the enactment of Finance [No.2] Act of 1998 which came into effect w.e.f. 1/4/1998, the provisions popularly known as Kar Vivad Samadhan Scheme [for short 'KVSS' hereinafter] came into force which inter alia provided that an assessee who has tax arrears can make a declaration to that effect before the Designated Authority from 1st September 1998 until 31st December 1998. On such declaration being made, the amount payable by such assessee shall be determined by Designated Authority in terms of section 88 of the Finance [No.2] Act of 1998; on the payment of which, the assessee would obtain certain immunities, to which we shall refer later and were to be discharged from all liabilities in respect of `tax arrears' under declaration. The last date for filing declaration had been extended upto 31st January 1999.

Apart from the fact that an assessee in order to invite operations of KVSS has to be in respect of a determined liability under relevant taxing statutes, it was further pre-conditioned that in respect of such tax arear under the relevant enactment as on the date of declaration, there must be pending an appeal, reference or writ petition or revision before the appropriate forum. Though assessee in anticipation of pending proceedings u/s 143 [3] had made a declaration in the first instance on 29th December 1998, even before the assessment u/s 143 [3] had come into existence, on completion of assessment u/s 143[3], he filed an appeal against it, and a fresh declaration was made before 31st January 1999, the extended date inter alia contending that regular assessment having come into existence u/s 143[3], it results in modification of tax already determined u/s 143[1][a] and an appeal against such order having been admitted and pending before the CIT [Appeals] as on the date of declaration, the applicant is entitled to benefit of KVSS. By impugned order, the petitioner was informed that the tax for the impugned assessment year had not been determined before 31/3/98 but was determined only on 18th January 1999, whereas the scheme is applicable only in cases where tax arrear exists in respect of such liability is determined on or before 31/3/98 and such demand remains unpaid until date of declaration and pending in respect of tax arrears on 31st March 1998.

Aggrieved with the aforesaid order, this petition has been filed.

3. Before we embark upon an inquiry on the question raised before us, it would be appropriate to scan the scheme in brief. The scheme has been introduced as a consolidated measure on effecting recovery of outstanding arrears of tax which have been clogged as a result of litigations surrounding it. Moving the Finance Bill, the Finance Minister in his speech explained the object of the scheme in the following terms :-

"Litigation has been the bane of both direct and indirect taxes. A lot of energy of the Revenue Department is being frittered in pursuing large number of litigations pending at different levels for long periods of time. Considerable revenue also gets locked up in such disputes. Declogging the system will not only incentives honest tax payers, enable Government to realize its reasonable dues much earlier but coupled with administrative measures, would also make the

system more user - friendly. I therefore propose to introduce a new Scheme called Samadhan."

The Scheme is contained in Chapter IV of the Finance Act No.2 of 1998 and comprising in section 86 to section 98.

4. Section 88 declares that, subject to the provisions of this Scheme, where any person makes, on or after the 1st day of September, 1998 but on or before the 31st day of December, 1998, a declaration to the designated authority in accordance with the provisions of section 89 in respect of 'tax arear', then, notwithstanding anything contained in any direct tax enactment or indirect tax enactment or any other provision of any law for the time being in force, the amount payable under this Scheme by the declarant shall be determined at the rates specified thereunder.

Section 89 provides that a declaration under section 88 shall be made to the Designated Authority and shall be in such form and shall be verified in such manner as may be prescribed.

Section 90 provides for the time and manner of payment of 'tax arear' and consequences that follow as apparently been provided u/s 90 and 91. Section 90 in the first instance directs the Designated Authority to determine within 60 days from the date of receipt of the declaration u/s 91, the amount payable by the declarant in accordance with the provisions of the Scheme and grant a certificate in such form as may be prescribed to the declarant setting forth therein the particulars of the 'tax arrear' and the sum payable after such determination towards full and final settlement of 'tax arrear'. Within 30 days of the passing of the order passed by the designated authority, the declarant is required to pay the amount so determined by the Designated Authority and intimate the facts of such payment to the Designated Authority along with proof thereof. On receipt of such intimation alongwith proof of payment, the Designated Authority is required to issue a certificate to the declarant to that effect under section 90 [2]. More importantly, under sub-section [3] of section 90, every order passed under sub-section [1], the determination of sum payable under this Scheme, shall be conclusive as to the matter covered by such order shall not be reopened in any other proceeding under the direct tax enactment or indirect tax enactment or under any other law for the time being in force. On the date on which the order referred to in sub-section [2] is passed, that is to say,

the certificate issued, on receiving the proof of payment of the amount determined by the designated authority, where the declarant has filed an appeal or reference or a reply to the show cause notice against any order or notice giving rise to the tax arear before any authority or Tribunal or Court, then notwithstanding anything contained in any other provisions of any law for the time being in force, such appeal or reference or reply shall be deemed to have been withdrawn on the date of the order passed u/s 90[2], provided further that where the declarant has filed a writ petition or appeal or reference before any High Court or Supreme Court against any order in respect of the 'tax arear', the declarant shall file an application before the High Court or the Supreme Court for withdrawing such writ petition, appeal or reference and after withdrawal of such writ petition, appeal or reference with the leave of the Court, furnish proof of such withdrawal alongwith the intimation referred to in sub-section [2]. On fulfillment of aforesaid conditions, u/s 91, the designated authority shall, subject to the conditions provided in section 90, grant immunity from instituting any proceeding for prosecution for any offence under any direct tax enactment or indirect tax enactment, or from the imposition of penalty under any of such enactments, in respect of matters covered in the declaration u/s 88.

Under section 92, no appellate authority shall proceed to decide any issue relating to the disputed chargeable expenditure, disputed chargeable interest, disputed income, disputed wealth, disputed value of gift or tax arear specified in the declaration and in respect of which an order had been made under section 90 by the designated authority or the payment of the sum determined under that section. The proviso to section 92 has since been held to be ultra vires by the Delhi Court in 236 ITR PAGE 1, which has been accepted by Union of India by issuing a press note on 28th November, 1998.

Section 95 declares that the provisions of the Scheme shall not apply in respect of 'tax arear' under any direct tax enactment in a case where prosecution for concealment has been instituted on or before the date of filing of the declaration u/s 88 under any direct tax enactment in respect of any assessment year, to any tax arear in respect of such assessment year under such direct tax enactment or in respect of a person who has been convicted for concealment on or before the date of filing the declaration or where the tax arear relates to direct tax in relation to which neither any appeal, reference nor writ petition has been admitted, and

pending before appellate authority or High Court or Supreme Court or no Revision is pending before Commissioner. Similar provisions also govern the operation of KVSS in respect of indirect taxes.

Thus, the central theme of the scheme is existence of tax arrear and pendency of dispute in the appropriate forum as on the date of filing declaration, and culmination of such pending proceedings or dispute on payment of amount determined under it. This inheres that the scheme applies in respect of tax liability which has been determined in some way and that could be subjected to dispute. The present controversy has to be viewed in this backdrop.

5. Under Section 87[m], term 'tax arrear' has been defined. 'Tax arear' in relation to direct tax enactment means the amount of tax, penalty or interest determined on or before the 31st day of March, 1998 under that enactment in respect of an assessment year as modified in consequence of giving effect to an appellate order but remaining unpaid on the date of declaration. The 'tax arrear' in relation to indirect tax enactment means, "the amount of duties [including drawback of duty, credit of duty or any amount representing duty], cesses, interest, fine or penalty determined as due or payable under that enactment as on the 31st day of March 1998 under that enactment but remaining unpaid on the date of making a declaration u/s 88 or the amount of duties [including drawback of duty, credit of duty or any amount representing duty], cesses, interest, fine or penalty which constitutes the subject matter of a demand notice or a show cause notice issued on or before the 31st day of March 1998 under that enactment but remaining unpaid on the date of making a declaration u/s 88, but does not include any demand relating to erroneous refund and where a show cause notice is issued to the declarant in respect of seizure of goods and demand of duties, the tax arear shall not include the duties on such seized goods where such duties on the seized goods have not been quantified."

6. The KVSS is woven around the thread of unpaid tax in respect of a particular assessment year under direct tax enactment which has been determined on or before the 31st day of March 1998, and existence of a dispute relating to such 'tax arrear' which has to be pending. The twin object is collection of revenue and end of the dispute by settling the amount payable against such 'tax arrear' on payment of which the pending litigation in respect of settled 'tax arrear' ends and assessee is

granted immunity from liability to interest, penalty and prosecution in respect of such 'tax arear'. The two objects do not exist independent of each other but go hand in hand.

7. At this juncture, it will be profitable to notice that this part of the Scheme was subjected to challenge on the anvil of being ultra vires the provisions of the Constitution on the ground of being violative of Article 14 before the Delhi High Court. Amongst many grounds, one that found favour with the Delhi High Court was that no distinction can be made about the applicability of the Scheme and consequences to follow on the basis of the status of litigating parties as to who is the appellant and who is the respondent. It therefore struck down the proviso to section 92 and read down the definition of tax arear u/s 87[m] by expanding it to such amount of tax determined which though has been reduced or set aside in appeal or other proceedings under the act on the relevant date, but is still intended to be carried further in litigation by the Department by not accepting the verdict in favour of the assessee, thus, making it conform to the twin objects of clearing the tax arrears with settlement of pending litigation by not making any distinction between at whose instance the litigation is pending. The decision is reported in 236 ITR page 1 and as noticed by us above, it has been accepted by the Union of India as well.

Therefore, the controversy before us has to be examined in the light of these provisions.

8. The assessee claims that in the first instance he has received intimation u/s 143[1][a] of tax payable by him. That is a determination of tax within the meaning of section 87[m]. As per explanation appended to section 143[1][a], such intimation is considered to be appealable order. When regular assessment is made u/s 143[3], the order u/s 143[1][a] is replaced by the regular assessment. This amounts to modification of determination made u/s 143[1][a]. Demand created as a result of such modified determination is unpaid. Such unpaid tax is `tax arrear' within the meaning of section 87[m] of the act of 1998. He contends, inasmuch as under the Income Tax Act, for assessment year 1996-97, the tax has been determined firstly u/s 143[1][a] before the 31st day of March 1998 which stands modified as a result of regular Assessment under section 143[3] before the declaration was made, giving rise to demand of tax which was unpaid on the date of declaration. He has also filed an appeal u/s 246 before the CIT [Appeals] and as he has

paid the tax as per the return submitted by him, he also fulfils the condition of admitting any appeal under section [4] of section 249 of the Income Tax Act which saves him from inhibition of section 95 of the KVSS. He further contends that the expression 'as modified giving effect to an appellate order' must be construed in the light and context of the object with which the scheme has been floated and should receive purpose oriented meaning, in preference to literal meaning. It was urged that in its literal sense, modification in consequence of giving effect to an appellate order will take into account only orders made in appeal and which will leave modification of order even by way of revision out of consideration. In giving such a meaning to `modification of determination made prior to 31st day of March 1998' in its literal sense, the very purpose of requiring the pendency of a dispute whether by way of reference, writ petition or revision in addition to appeal as an alternative, would be rendered meaningless. Moreover, the modification of tax determination under the Act does not necessarily come by way of an appellate order, but it comes under very many provision of the enactment under which such determination has been made. Since the purpose is to recover `unpaid tax' as on the date of declaration, all orders made under the relevant enactment which has the effect of modifying the `existing tax determination' in its broader sense, must be held to fall within the expression 'an appellate order' resulting in modification of the determination made on or before the 31st March 1998. For advocating such rule of, interpretation reliance was placed on the cases reported in C.B.Gautam v/s Union of India & ors. 199 ITR 530, Director of Enforcement V/s Deepak Mahajan [AIR 1994 SC 1775] and Commissioner of Income Tax, Bombay v/s Gwalior Rayon Silk Mfg. Co. Ltd. [AIR 1992 SC 1782].

9. On the other hand, it has been urged by the learned counsel for the Revenue firstly that, computation of tax made u/s 143[1][a] cannot in any sense of the term be held to be a determination of the amount of tax penalty or interest. U/s `143 [1] [a], mere computation of tax is made on the basis of information furnished by the assessee without examining the merit of claim and the adjustment which can be made are at best is expression of prima facie opinion of the assessing officer without calling upon the assessee to explain the same. Such an expression or opinion which is bound to be considered during regular assessment, if raised by the assessee and can be revised by the very same authority, cannot amount to be a determination within the meaning of section 87 [m]. It was further submitted that, assuming that

intimation u/s 143[1][a] amounts to a determination within the meaning of section 87[m] of the Act of 1998 and an assessee can avail of KVSS in respect of such determination, it can only relate to the dispute relating to adjustments actually made and intimated, and modification to such determination, if any, that may take place before the date of declaration, but cannot include any question which fell outside the scope of determination u/s 143[1][a] which has not in fact been determined by the assessing officer. The regular assessment is not modification of any determination made u/s 143[1][a], but is an order independent of determination on its own. At best, it can be said that such an order can result in modification of intimation u/s 143[1][a] only and no more.

10. At the centre of entire controversy, key expression is 'determination on or before the 31st day of March 1998'. On the one hand, the view canvassed by the petitioner is that the word 'determination' is of wide connotation and takes within its purview, the determination of tax by way of self assessment under the Income Tax Act relate with which we are presently concerned, and is the assessment made u/s 143[1][a]. It is not required necessarily that such determination must be by way of final adjudication of any issue. On the other hand, the contention of the revenue is that, in the context in which the term appears and in the context of the scheme, it can have only meaning to be a determination by application of mind by an authority under the relevant enactment, resulting in final disposal of an issue so far as he is concerned. Anything which has not been so determined by any of the concerned authority before the 31st day of March 1998, determination of a question for the first time thereafter under any proceedings would not fall within the expression used in KVSS and its determination subsequently to the date of 31st day of March 1998 would not bring the case of an assessee who has not paid the tax in pursuance of determination, cannot be covered under the Scheme.

11. It has to be noticed and about which there is no dispute that, if literal meaning is given to expression 'as modified in consequence of giving effect to an appellate order', which will not include any order except made in appeal and will not include any order made in revision or by a court in writ or reference, the case of the petitioner does not fall within section 87[m], assuming that intimation u/s 143[1][a] amounts to determination of tax on or before the 31st day of March

1998, inasmuch as no amount of tax determined vide intimation dated 10/1/1997 u/s 143[1][a] was unpaid on the date of declaration. No appeal, reference, writ or revision was pending in respect of the determination u/s 143[1][a]. There being no appellate order by accepting literal meaning of an appellate order, no modification can be spelt out in the tax determined vide the intimation dated 10/1/97 within the meaning of section 87[m].

12. We are of the opinion that accepting such literal interpretation in the context of the scheme would be too narrow and inapt which will result in defeating the very object of the scheme, taking into consideration also the fact that the definition has been read down by the Delhi High Court and such reading down has been accepted by the Union of India as noticed by us above.

13. One object of the scheme is to clear the existing 'tax arear' as on the date of declaration on payment of amount determined by the designated authority. The first feature of the scheme is that what is intended to be settled under the KVSS was the 'tax arear' existing as on the date of declaration. Not only that there has to be in existence a tax arear on the date of declaration, but in respect of such tax arear, there has to be a pending dispute. If the quantum of 'tax arear' had no relation to its inacceptability, and likelihood of its modification in the pending dispute, the imposition of such condition would be meaningless inasmuch as in that event the actual amount spelt out on that date would have served the purpose. It is relevant to notice that effect of determination of amount u/s 90 and its payment by the assessee results in further declaration that no matters covered by such orders shall be reopened under the direct tax enactment or indirect tax enactment or under any other law for the time being in force. That is to say, it would not only draw a curtain on the pending dispute as to the liability of assessee about 'tax arear', but restrain further proceedings of any nature for existing issues in respect of relating to the 'tax arear' which has been settled. So also, it has now been accepted that even in the case where the tax determination prior to the 31st day of March 1998 stands set aside by an order of superior authority or under any other provisions of the Act, but the revenue intends to challenge that order or is in appeal or in any other forum for revising that order, the scheme applies. That is to say, notwithstanding there may not be any tax arear as per the existing order as on the date of making a declaration, but as per the unmodified determination of tax made prior

to the 31st day of March 1998 amount is due and relief granted in favour of the assessee is under challenge by the revenue or is intended to be subjected to challenge by the revenue, still the KVSS operates.

14. The Delhi High Court said in A.I.F.T.P. V/s Union of India [Delhi] [supra] pointed out how the purpose of legislation would be best achieved by explaining as under:-

> "A and B are both litigating assesses. Both are in arrears of tax. From none of the two the Revenue has realised the amount of tax. The cases of the two are sought to be distinguished solely by applying the distinguishing feature of who is the appellant. Here the distinction between the two becomes unreal and artificial and in any case arbitrary. In our opinion, both the cases should have been covered by the scheme. In both the cases, the Legislature would achieve the twin object : the litigation would come to an end and the arrears of tax will be realised in the same quantity from the two assesses. In fact, the Revenue should show more inclination in favour of the assessee - A who inspite of having succeeded at one stage of the litigation is still prepared to give up his fight though by way of defence and is prepared to accept his liability to pay the tax which was quantified at one stage."

15. This goes to suggest that what is contemplated as 'tax arear' as on the date of declaration is directly related to the maximum claim made by the Revenue as to the liability of tax under the relevant enactment at one stage of determination. Later dispute between the parties as to the extent of liability so determined is relevant only for providing opening for operation of the scheme to settle the dispute. The Merit of dispute is not relevant. What is relevant is that in case actual arrears do not really exists as on the date of declaration as per the orders existing on that date, but because of the pendency of the proceedings in respect of such orders which relate to already determined liability to pay tax, which is likely to resurrect wholly or partly, the dispute must end, the assessee accepts his liability to pay the tax which as quantified at one stage and is likely to be reinstated on success of the pending proceedings, though presently orders are in his favour. Meaning thereby that the liability in respect of tax, of which determination has been made prior to 31/3/98, must

be accepted as on the date of declaration as the amount determined and any sum unpaid out of it as outstanding. The unpaid tax must be referable to that amount as on that date and consequential quantification of the amount payable by the assessee has to be made on that basis. If this meaning is not assigned to it, it would be impossible to compute the amount of tax payable u/s 88 in respect of an assessee who is defendant in the pending dispute at the behest of Revenue where at one stage, his contention has been accepted and the liability is reduced to admitted extent by the assessee. Viewed in this context, the modification of tax determined prior to the 31st day of March 1998 must necessarily relate to modification of such liability of tax under different provisions of the Act which does not necessarily come in the form of appeal, as ordinarily understood to be distinct from other modes by which any operating order is reviewed or modified, but to proceeding by which such order can be reviewed in accordance with law, resulting in modification of the orders already made. It will not include new orders which instead of review of existing order results in substitution by new order.

16. In this connection, it may further be noticed that, under the scheme of Income Tax Act, liability to pay tax does not necessarily call for an order of adjudication. So also, modification of determination of the liability once quantified by the assessing officer under the provisions of the Act does not necessarily depend on giving effect to an appellate order. Such modification can come in many ways. The same officer by having recourse to proceedings u/s 154 can modify the earlier determination. It can be modified by having recourse to appeal by the aggrieved party - revenue or the assessee. It can be modified by having recourse to the revisional jurisdiction of the Commissioner whether u/s 263 or u/s 264 of the Income Tax Act. If the modification of the 'tax determined' before the 31st day of March 1998 is confined only to modification by way of giving effect to an order passed in appeal notwithstanding such modification having come into effect otherwise than by way of appeal and a liability to pay the tax directly referable to earlier determination stand altered as on the date of declaration, whether exceeding the original quantification or lower than the original quantification, part of unpaid arrears would remain out of consideration for the purpose of computing the amount payable under the scheme for the settlement of the pending dispute without reference to the real arrears and dispute in respect of which recovery is to be made and dispute is being settled. That result in our opinion can

hardly be said to be intended by the Legislature while enacting the KVSS. The very fact that declaration that the 'tax arear' has to be considered as on the date of declaration, it must be constituted that the tax arear which is directly related to the determination made prior to the 31st day of March 1998, but which has been modified since then, the liability is referable to the final modification in accordance with the provisions of the enactment subject to the pending dispute in respect thereof. If the latest modification under the enactment of the original determination is not taken into account, and is confined only to the appellate order, it would result in giving concession in respect of public revenue which was never intended in the totality of the scheme laid as a whole by the Department.

16. We are therefore inclined to accept the contention of the learned counsel for the petitioner in so far as it concerns the giving of meaning to the term 'as modified in consequence of giving an effect to an appellate order' is not merely confined to literally an order passed in appeal, but must relate to modification of the amount of tax penalty or interest determination on or before the 31st day of March 1998 under any of the remedial provisions of the Act touching the determination of tax made prior to 31/3/98, may it be by rectification of the same order or by revisional authority having recourse to powers of revision u/s 263 and 264 or by way of giving effect to an order in appeal or by way of giving effect to an order passed in any other form which results in modification of such determination. The word 'appellate order' has been used in its wider connotation to an order which has an effect to modify order in relation to issue decided therein by any process of remedies made available to assessee against the original determination made under the enactment and can properly be termed as continuation of original proceedings and not confined to the status of the form by which the original order is effected. However, it does not cover the case where the proceedings are a new or denovo like reassessment proceedings or by rectification of an order in relation to a matter which had not been subjected to determination earlier and results in a new order coming into existence.

18. The next question which calls for consideration is what is the scope of ambit of word 'determination' in the context of the Scheme? Whether it can include the intimation u/s 143[1][a] of the Income Tax Act ?

19. In its literal sense, the word 'determination'

derivative form verb to determine means `to settle or decide which in its literal sense in the context of law means to to give a judicial decision.' That is the meaning given to the word 'determination' or to determine under the Shorter Oxford English Dictionary.

"Black on Law Dictionary", while referring to word 'determination' states, "The decision of a Court or administrative agency. It implies an ending or finality of a controversy or suit." It further says,

> "a determination is a final judgement for purposes of appeal when the trial court has concluded its adjudication for the rights of the parties and the action."

It also says as respecting assessment the term implies judgement and decision after weighing the facts.

20. Somewhat similar view has been expressed by Their Lordships of the Supreme Court while considering the meaning of word 'determination' in the context of the expression used in Article 136 of the Constitution in case of Jaswant Sugar Mills Ltd. v/s Lakshmi Chand and others [AIR 1963 SC 677].

21. Article 136[1] of the Constitution provides that, notwithstanding anything in that chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgement, decree, determination, sentence or order in any case or matter passed or made by any court or tribunal in the territory of India. In the context, it was held that expression `determination' signifies an effective expression of opinion which ends a controversy or a dispute by some authority to whom it is submitted under a valid law for disposal.

22. As we find that, under the Scheme, the basic features are that there must be an amount of tax penalty or interest determined, which should have remained unpaid on the date of declaration, and in respect of such 'tax arear', an appeal or reference or writ petition or a revision is pending before the concerned Forum on the date of filing declaration, it clearly envisages that the term `determined' has been used in respect of the determination of tax liability or quantum of sum to be paid by a tax payer which has the colour of effective expression of opinion by the assessing officer about the liability of tax payer assessee to pay any amount by way of tax, interest or penalty, by deciding any controversy surrounding the same, if any, which he is required to

decide under the statute. The determination u/s 87[m] is not divorced from the ingredients of a determination of issue between the assessee and the revenue by the competent officer under the enactment in the first instance and it must have the colour of a determination which can be subjected to further appeals in the sense is liable to be modified under different methodologies of redressals. Therefore, a self assessment or an undisputed computation of tax simpliciter when the same is done at a stage when issues are not to be decided, but the duty is cast to act on assumption of correctness of information disclosed, by deferring decision thereon at a later stage, does not amount to determination of tax within the meaning of section 87[m]. But where there is a disposal of any issue by an authority under the relevant enactment designated to quantify the amount of tax penalty or interest which can be subjected to remedial measures would certainly come within the meaning of determination of tax penalty or interest envisaged u/s 87[m].

23. Applying this test, if one looks at section 143[1][a], we find that on submission of a return by a person whether voluntarily u/s 139 or in response to a notice u/s 143[2], as it existed at the relevant time, the assessing officer has to find out on the basis of such return, after adjustment of any tax deducted at sources, advance tax, if any, was paid, or any amount otherwise paid by way of tax or interest, whether any tax or interest is due from the assessee or if any refund is due to the assessee on the basis of such return. According to such finding, he has either to intimate the assessee raising a demand or granting a refund. In doing so, the assessing officer is empowered to make certain adjustments which are enumerated in proviso to section 143[1][a], which reads as under :-

"143.- [1] [a] ::ASSESSMENT ::

"Where a return has been made u/s 139, or in response to a notice under sub-section [1] of section 142,-

[i] if any tax or interest is found due on the basis of such return, after adjustment of any tax deducted at source, any advance tax paid and any amount paid otherwise by way of tax or interest, then, without prejudice to the provisions of sub-section [2], an intimation shall

be sent to the assessee specifying the sum so payable, and such intimation shall be deemed to be a notice of demand issued under section 156 and all the provisions of this Act shall apply accordingly; and

[ii] if any refund is due on the basis of such return, it shall be granted to the assessee :

Provided that in computing the tax or interest payable by, or refundable to, the assessee, the following adjustments shall be made in the income or loss declared in the return, namely :-

[i] any arithmetical errors in the return, accounts or documents accompanying it shall be rectified;

[ii] any loss carried forward, deduction, allowance or relief, which, on the basis of the information available in such return, accounts or documents, is prima facie admissible but which is not claimed in the return, shall be allowed;

[iii] any loss carried forward, deduction, allowance or relief claimed in the return, which, on the basis of the information available in such return, accounts or documents, is prima facie inadmissible, shall be disallowed:

[Provided further that an intimation shall be sent to the assessee whether or not any adjustment has been made under the first proviso and notwithstanding that no tax or interest is due from him:]

{[Provided also] that an intimation under this clause shall not be sent after the expiry of two years from the end of the assessment year in which the income was first assessable.}

[1A][b] xxxxxxxx

[2] xxxxxxxx

[3] xxxxxxxx

[4] xxxxxxxx

[5] xxxxxxxx

[6] xxxxxxxx

[Explanation - An intimation sent to the assessee under sub-section [1] or sub-section [1B] shall be deemed to be an order for the purposes of sections 246 and 264]."

24. Not only that the assessing officer is authorised to make these adjustments which has an effect either of raising a demand or granting a refund, apart from the fact that computation made in the return itself, such intimation as per Explanation to section 143, inserted w.e.f. 1/10/91 is further considered to be an order for the purpose of section 246 and 264. That is to say, it can be appealed against or the petition for revision can be filed by the aggrieved assessee. Therefore, to the extent the assessing officer applies his mind to the facts and makes adjustments as are permissible under clauses 1, 2 and 3 to the proviso, prima facie at best he has to decide, exparte and tentatively which may be deemed an order for the purpose of appeal. If that be so, it can at best be said that an intimation u/s 143[1][a] to the extent it makes adjustments on prima facie view is determination of amount of tax or interest or penalty leviable under the Income Tax Act on the basis of the facts disclosed in the return without examining their correctness, with adjustments referred to in proviso, amounts to determination and if as a result of such intimation, any amount of tax interest or penalty payable by the assessee remains unpaid as on the date of declaration and if an appeal, revision, reference or writ petition as required u/s 95 is pending. In that event, the Scheme may operate in respect thereof and the assessee may be entitled to make a declaration in respect of such unpaid arrear. Without examining further, for the present purpose, we assume it to be so.

25. This brings us to the final controversy where no adjustment has been made in respect of any item disclosed in the return filed by the assessee u/s 143[1][a], but subsequently an order u/s 143[3] is made, which results in raising of a demand, can it be said to be resulting in modification of determination made u/s 143 [1] [a] of the amount of tax, interest or penalty as the case may be.

26. We have noticed above that the word 'determination' has necessary ingredients of a decision

making by the competent authority after weighing the fact and disposing of the controversy or the dispute as far as he is concerned. We have already noticed u/s 143[1][a], the competent officer acts for computing the amount of tax or interest. On the basis of return filed, it does not envisage the determination of any question of fact or law on merits at that stage which has the effect of finally determining the quantum of tax payable by the assessee for the relevant assessment period by the assessing officer. Only authority which he enjoys at that stage is either to correct arithmetical error in the return, accounts or documents accompanied by rectifying the same or to allow any loss carried forward deductions, allowances or relief though not claimed in the return, which in his opinion, is prima facie admissible on the basis of information from any such return, accounts or documents or to disallow any such claim in the return which on the basis of information from any such return, accounts or documents is prima facie inadmissible. It certainly postulates application of mind whether in respect of any particular item, the assessing officer is prima facie of the opinion on the available material without travelling outside the available information about its admissibility or inadmissibility, its truthfulness or otherwise, he can make that adjustment for the purpose of computing the tax or interest. However, where he is not able to make such prima facie opinion, there is no ground to presume that he holds prima facie opinion otherwise, which can be considered as `determination' by him of any claims made by the assessee, by prima facie holding the same admissible or inadmissible, as the case may be. Such claims are all in the realm of question yet to be determined on which no expression of opinion has been made by the assessing officer. Therefore, any claims to relief made by the assessee in his return, but not adjusted at the time of determination u/s 143[1][a] cannot be said to be prima facie determination in favour of the assessee. If there is no determination of any fact or question, the question of its modification later on by any decision would not arise. The later decision, if any, would be an independent determination of the issue for the first time not affecting the quantification made earlier by way of modification. In our view, to the extent, where in respect of any claim, no adjustments have been made, at the stage of intimation u/s 143[1][a], but a determination has been made for the first time later on u/s 143[3], the order u/s 143[3] cannot be considered to result in modification of any liability to pay any amount of tax or interest under any pre-existing determination of amount of tax or interest.

27. Sub clause [b] of section 143[1] is also a pointer to the extent litigation about adjustment or computation is liable to be modified subsequently. That is to say at best intimation u/s 143[1][a] can be said to be prima facie determination of tax as per adjustments made under proviso; and later alteration in that regard whether under clause [b] of section 143[1] or by way of appeal or reference or rectification of such adjustments are made, only can be said to be modification of tax, interest or penalty so determined for the purpose of KVSS u/s 87[m] of the Finance [No.2] Act of 1998, but it cannot take within the ambit determination of tax liability u/s 143[3] for the first time as modification of intimation u/s 143[1][a]. Therefore, unless adjustment u/s 143[3] has come prior to 31/3/98 or it affects the adjustments made u/s 143[1][a] as per clause [b] of section 143[1], the same cannot be subjected to KVSS, by considering it to be modification of an intimation u/s 143[1][a] that has come into existence prior to 31/3/98.

28. If the view canvassed by the learned counsel for petitioner is to be taken to its logical end, it would result in a very anomalous situation. An assessing officer is to compute tax u/s 143[1][a] by assuming the information furnished by assessee to be correct. He has to make intimation of such computation whether made with or without adjustments. It cannot be said where no adjustments are made, yet computation of tax as per return, there will still be right of appeal to assessee. Appeal is right of an aggrieved party. In such situation also, on completion of regular assessment u/s 143[3], the liability of tax determined may be different from computation u/s 143[1][a]. By parity of reasoning canvassed by learned counsel, it will amount to modification of intimated computation of tax u/s 143[1][a]. This will result in a situation where an assessing officer does not find any prima facie case for adjustment, and does not determine anything even provisionally, yet it will tantamount to determination of tax on the date of intimation. Such an interpretation will be contrary to very object and purpose of the Scheme. That line in fairness, learned counsel has not adopted and candidly stated that in such event, there cannot be any question of modification because intimation itself cannot be considered a determination.

29. This affirms the conclusion to which we reach firstly that in order to come within the term 'determination' of tax liability or penalty, there has to

be a conscious determination of that liability with some application of mind. Secondly, more importantly for the present purpose, the tax, interest or penalty determined prior to 31/3/98 as modified in consequence of giving effect to an appellate order can only relate to such modification which results in altering the determination earlier made through conscious application of mind and not by subsequent determination of any liability of tax, interest or penalty on new and undetermined issues.

30. In this connection, it becomes relevant to notice the consequence that flow from the order made u/s 91 and order made u/s 92 firstly on making of an order u/s 90[1]. It shall be conclusive as to the matters stated therein and no matter covered by such order shall be reopened in any other proceeding under the direct tax enactment or indirect tax enactment or under any other law for the time being in force.

31. The requirement of section 95 that the provisions of the Scheme shall not apply in respect of tax arrear under any direct tax enactment to a case where no appeal or reference or writ petition is admitted and pending before any appellate authority or High Court or the Supreme Court on the date of filing declaration and further, the consequences under sub-section [4] of section 90 that upon making payment of the sum determined by the designated authority, then notwithstanding anything contained in any other provisions of any law for the time being in force, such appeal or reference or reply shall be deemed to have been withdrawn on the day on which the order referred to in sub-section [2] is passed or the assessee is required to withdraw his petition or the reference or appeal pending before the High Court or the Supreme Court against any order in respect of tax arrear, relates the entire gamut of the scheme to the matter of determination prior to the 31st day of March 1998 which are liable to be modified, but does not relate to determination of questions subsequent to the 31st day of March 1998, though it might create or reduce the amount of tax payable by the assessee before the date of declaration as contemplated u/s 89.

32. The thread runs through out the scheme. Declaration is in respect of 'tax arrear' relating to assessment year, pendency of dispute before any authority under the relevant enactment or High Court or the Supreme Court after determination of tax interest or penalty has been made and conclusive of the matter made u/s 91 and further prohibition of reopening any matters in respect thereof in future as well as provisions as to withdrawing

of petition, appeal or reference pending in the High Court or Supreme court are in respect of 'tax arrear' which necessarily relate to the amount determined prior to the 31st day of March 1998 as modified through other orders under the enactments as the common ingredient of amount of tax, penalty or interest determined prior to the 31st day of March 1998.

33. In these circumstances, the only meaning which the word 'determination' u/s 87[m] can have is that it relates to any determination made by an authority under the relevant Act consciously prior to the 31st day of March 1998 and pendency of a dispute relating to such conscious determination at any level of remedial forums, in the context, must also lead to conclusion that modification by giving effect to appellate order must have direct connection with the matters determined on or before the 31st day of March 1998 and alterations in an amount of tax, penalty or interest as a result of first time determination of any issue after the 31st day of March 1998 is not envisaged.

34. It is right to say that there are three steps in levy of tax. Firstly, liability to tax is determined exhypothesi at the close of previous year by operation of the charging provision under the Statute. Obviously, determination u/s 87[m] does not refer to such exhypothesi determination of tax. Secondly, the quantification of that liability which exhypothesi stand determined, takes place at later stage through machinery provided under the relevant enactment and the third stage of assessment is about recovering the amount so determined. Though in broad sense the term determination of tax, penalty or interest may include all the three stages of levy and collection of taxes, in the very nature of scheme with which we are concerned, it can only relate to the second stage. The last stage being referable to the recovery and the scheme itself deals with providing an avenue of recovery on fulfillment of certain conditions that certain concessions following is past the third stage of tax determination. Prima facie self assessment and computation of tax u/s 143[1][a] too is a part of third stage of reckoning the tax, that extent, at pre assessment stage at the point of filing of returns. Section 87[m] refers to determination of the amount of tax, penalty or interest. Obviously, to the second stage, namely, quantification of the liability to pay the tax, penalty or interest, as the case may be, in accordance with the machinery provisions of the Act. In turn, such determination which results in coming into existence of the orders which can be further dealt with

in any remedial forums by filing appeals, revisions or rectification applications by suo motu exercise of powers of rectification or revision under the relevant provisions of the Act to the amount of determination within the meaning of section 87[m]. However, as the relief is confined to such determination of liability which remains unpaid and in respect of which, dispute is pending, any modification which is made in a liability determined prior to the 31st day of March 1998 must refer to the determination made under such orders and not determinations made independent of such orders. In the former case, it would be a modification of the amount of tax, penalty or interest determined on or before the 31st day of March 1998 as a consequence of giving effect to a remedial order, but would not include the determination of liability itself at a later stage in respect of any claim made by the assessee which had not earlier been determined and which could not have been made subject to remedial measures, until so determined by the competent authority under the Act.

35. To sum up unpaid tax or 'tax arrear' as on the date of declaration u/s KVSS relates to tax, interest or penalty which has been determined on or before the 31st day of March 1998 though it may have suffered modification as a result of giving effect to remedial orders. The modification envisaged can only relate to the orders which had the effect of modification in respect of matters already determined prior to the 31st day of March 1998, but not in respect of matters which are yet awaiting determination. Under the Scheme of section 143[1] while issuing the intimation, the assessing officer does not decide any issue of contest. His task is only to compute the tax and interest, if any leviable as per the information submitted in the return by the assessee, assuming the same to be correct and after adjusting the amounts already paid by the assessee, to find out whether any amount is payable by the assessee or refund that is due to the assessee and intimate such results to the assessee. In the process, he has been authorised to make certain adjustments where he is able to form a prima facie opinion about the admissibility of any claim made by the assessee or inadmissibility of any claim, though not made by any assessee, but is liable to deductions or not liable to be taxed or likewise any claim made by the assesses is found to be inadmissible or relief. However, at that stage, nothing beyond formation of prima facie opinion about admissibility or inadmissibility of any claim or relief is envisaged. In other words, no determination of any issue between the assessee and the revenue is made in the sense that the

competent authority finally disposing off the issue. In fact, mechanism is defined as part of third stage of recovery, ordinarily to ensure recovery of tax on admitted facts before liability is determined as envisaged in the second stage of levy. The mere fact that because it results in imposition of additional liability on the assesses and the appeals have been provided, even against such adjustments made, does not make its determination of tax, penalty or interest which ex hypothesi is determined at the close of year of operation of the charging sections so as to hold that making of the regular assessment u/s 143[3] results in modification of order u/s 143[1][a].

36. As we reach this conclusion, we have no hesitation in further concluding that since the claim of the assessee, was not a subject matter of adjustment u/s 143[1][a], subsequent determination of assessee's claim to relief under regular assessment u/s 143[3] about taxability of arrears of professional fees received during the relevant previous year after the assessee has ceased to carry on profession, cannot be said to be a remedial order resulting in modification of amount of tax already determined by any process of determination on or before the 31st day of March 1998. It was independent and original determination of tax, penalty or interest payable as per regular assessment which was admittedly framed in January 1999 much after the due date for claiming the benefit under the KVSS.

37. In view of our aforesaid conclusions, we are of the opinion that the Designated Authority was justified in not acting on the declaration made by the assessee in respect of regular assessment which came into existence only on 18th January 1999.

38. The petition fails and is hereby dismissed. There shall be no orders as to costs.

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